

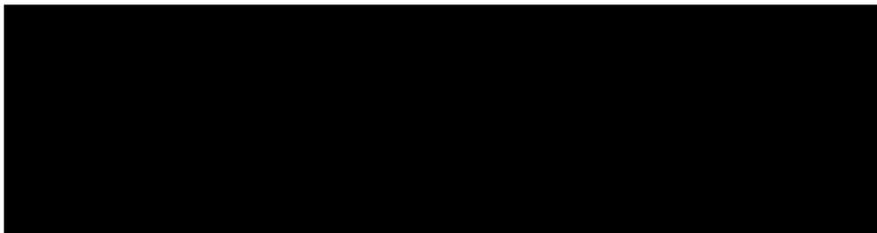
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



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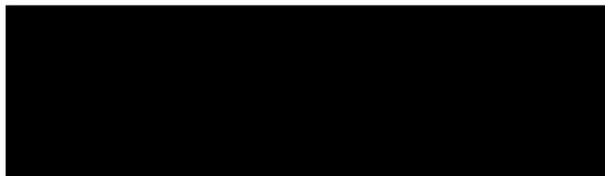
Date: **MAY 18 2010**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a limited liability company organized in the State of Missouri in 2007, states that it is engaged in the sale and distribution of gaskets and gasket materials, primarily for the automobile industry. It claims to be a subsidiary of [REDACTED], located in Izmir, Turkey. The beneficiary was initially granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his status for two additional years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that it believes that its previously submitted documentation "was not able to clearly communicate [the beneficiary's] duties within the company." The petitioner has submitted four statements in support of the appeal, along with additional documentary evidence, in an effort to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate in a managerial, executive or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(I)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (I)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training and employment qualifies him/her to perform the intended services in the United States; however the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 12, 2008. The petitioner indicated that the company had two employees, with a projected staff of two to three employees for 2009. In a letter dated November 7, 2008, the petitioner described the beneficiary's proposed duties as follows:

[The petitioner] would like for [the beneficiary] to continue to direct U.S. expansion of sales and consulting operations, including strategic planning, marketing, and sales, financial controlling, human resources and reporting; direct procurement, including strategic planning, and the management of marketing and sales, budgeting and finance, controlling, human resources and reporting. [The beneficiary] will ultimately be responsible for directing all of [the petitioner's] operations and expansion in the United States; directing all our activities including the essential functions of budgeting, contract negotiation, and human resources; and managing the hiring and training of personnel in compliance with our managerial style and philosophy. Finally, we would like for him to serve as a direct executive/managerial liaison between [the petitioner], our U.S. customers, and our parent company, Temel Gaskets Turkey.

The petitioner stated that the beneficiary also serves as a "[REDACTED]". [REDACTED] The petitioner indicated that its gross income exceeded \$125,000 during 2008 and that it has two employees and one contractor.

The petitioner submitted a business plan which provides an overview of fiscal year 2008 activities and projections for 2009. On page four of the business plan, the petitioner further described the beneficiary's relationship with NAPA Autoparts:

[The beneficiary] . . . has been providing consulting services to NAPA Autoparts (Automotive Parts Group, Atlanta, GA) and has achieved successful results that have generated savings over 10 million dollars for the company so far in 2008. NAPA has decided to continue to request [the beneficiary's] services and through out the completion of the current projects. NAPA is aiming at higher savings in 2009.

With respect to the company's goals, the business plan indicates:

[The petitioner] sets one of its main goals as expanding [the company's] US customer portfolio, therefore increasing the volume of business with its US clients. It will also focus on its other major operation and will aim at taking on more Six Sigma consulting projects within large automotive corporations similar to NAPA. [The petitioner] will implement Six Sigma to provide ways to reduce costs in the operations of these organizations.

The petitioner indicated that it will continue to offer Six Sigma quality management consulting services to major auto parts and auto manufacturing companies as a strategy for introducing its parent company as a supplier.

The business plan includes a chart depicting the operational structure of the petitioner and its parent company, which shows that the company's operations are divided into two areas: (1) foreign marketing management, including market research, tradeshow arrangement for the parent company, and customer account representation; and (2) Six Sigma Consulting Services for the auto industry, including Six Sigma Black Belt training and on-site project support, and software development for Six Sigma project management.

The petitioner further described the beneficiary's consulting activities on page 13 of the business plan:

[The beneficiary] has completed the Green Belt and the Black Belt training for Six Sigma. He is currently offering his consulting services as a Six Sigma Black Belt to NAPA Autoparts. [The beneficiary] manages over 75 active projects within the organization and provides support to 120 company employees from various managerial positions

* * *

As a part of the program, [the beneficiary] holds meetings with NAPA's top management for new project proposals and for discussion of project results. He also provides head quarter's support and field support for the roll out of the company's Six Sigma program.

The business plan also discusses the beneficiary's accomplishments with respect to marketing the company's products to U.S. customers, noting that the petitioner has experienced an increase in business with American

auto parts distributors PAI Industries, Magnum Diesel Parts and Maxiforce Diesel Engine Parts. The petitioner further indicated that the beneficiary is in communication with five potential new customers.

On page 19 of the business plan, the petitioner discusses the U.S. company's continuing operations, noting that the beneficiary "will continue to be in direct contact with [the foreign entity]" and "continue to be the main contact for [the foreign entity's] U.S. customers." The plan further indicates that the beneficiary "will continue his market indicators analysis and present the results to the top management as a decision support mechanism," represent the foreign entity at an upcoming U.S. trade show, and follow up with customers after the show. In addition, the plan indicates that the beneficiary will continue to be a consulting resource for NAPA Autoparts, "but will expand the coverage of the consulting side of [the petitioner's] operations to other major players of the auto parts industry."

The petitioner indicates in its business plan that it hired [REDACTED] who provides support for market research, maintains the Six Sigma project tracking tool developed by the beneficiary, and will be trained by the beneficiary as a Six Sigma green belt as a potential consultant for future Six Sigma projects. The petitioner stated that it also hired [REDACTED] as a contractor to provide support for web application design projects. The petitioner submitted "Privacy and Non-compete Agreement" for each employee. According to the agreements, both individuals were hired to develop applications or web applications.

Finally, the petitioner submitted a profit and loss statement for 2008 which shows income for services provided as follows:

[REDACTED]	\$14,500
[REDACTED]	\$107,140.98
[REDACTED]	\$325.00

The director issued a request for additional evidence (RFE) on November 19, 2008, in which she instructed the petitioner to submit additional evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity. Specifically, the director requested: (1) a more detailed description of the beneficiary's duties, including the percentage of time the beneficiary allocates to each specific duty; (2) the U.S. company's organizational chart clearly depicting the beneficiary's position and all employees under his supervision; (2) for each employee, a brief description of job duties, educational level, annual salaries/wages, and source of remuneration; (3) evidence of wages paid to employees including state quarterly wage reports and IRS Forms 941, W-2 and W-3; (4) a list of the discretionary decisions that the beneficiary has made over the last six months; and (5) a specific, day-to-day description of the duties the beneficiary performed over the last six months.

In response to the RFE, the petitioner submitted an affidavit dated December 15, 2008, in which it further described the beneficiary's duties as follows:

As President of [the petitioner], [the beneficiary] will manage and direct, through a subordinate team of function managers, degreed professionals, and other skilled workers, the marketing and sale of [the foreign entity's] products in the United States market. This managerial and executive job function will demand at least 60% of [the beneficiary's] time.

The remaining 40% of [the beneficiary's] time will be devoted to managing the delivery of the company's management consulting services to its largest corporate consulting client, NAPA Autoparts.

As President of [the petitioner], [the beneficiary] will specifically manage the company's account representatives, customer service manager, and marketing assistant, who will engage in market and cost analyses, the development of marketing and branding campaigns, and the sale and delivery of [the company's] product line to new and existing customers. He will also manage the company's software engineer, who will develop software products to facilitate and enhance the sale and delivery of [the company's] product, as well as the company's automotive consulting services to the company's customers. [The beneficiary] will have sole executive responsibility for directing the overall growth and development [of] [the petitioner]. [The beneficiary] will be exclusively vested with the authority to establish company policies and procedures and to make personnel decisions (e.g., the decision to hire, promote, coach, and/or fire other employees).

The petitioner stated that, as of the date of the affidavit, it employs the beneficiary, [REDACTED] and [REDACTED], and that it is in the process of hiring two additional employees. The petitioner stated that [REDACTED] supports the petitioner's Enterprise Resource Planning (ERP) software, which takes and processes customer orders and handles customer billing, and also develops software to support the company's management consulting services. The petitioner indicated that [REDACTED] conducts market research, analyzes return on investment for various modes of marketing, conducts cost analyses, and provides pricing and order status updates to customers. With respect to the future staff, the petitioner stated that one individual accepted a position as an account representative and management assistant, while the other individual would be a marketing assistant. In addition, the petitioner indicated that it intends to hire a second account representative and a customer service manager in "early 2009."

In lieu of the requested quarterly wage reports and IRS Forms 941, Employer's Quarterly Federal Tax Return, the petitioner submitted a letter from its accountant, who stated that the petitioner's only payroll activity occurred in the fourth quarter of 2008, and therefore, the relevant quarterly report is due on January 31, 2009 and had not been filed.

The director denied the petition on December 30, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director found that the petitioner described the beneficiary's duties in broad and general terms, without describing in detail what he does on a day-to-day basis. With respect to the beneficiary's supervision of subordinate personnel, the director emphasized that the petitioner did not submit any evidence of the two workers claimed to be employed at the time the petition was filed. The director observed that, as the petitioner did not appear to have any employees responsible for marketing, sales, budgeting, contract negotiations and human resources, the routine duties associated with these functions are likely performed by the beneficiary himself. The director concluded that the company had not grown to the point where it requires the beneficiary to perform primarily managerial or executive duties.

On appeal, the petitioner asserts that the director's decision was incorrect and states that its previously submitted documentation "was not able to clearly communicate [the beneficiary's] duties within the company."

In support of the appeal, the petitioner submits an updated organizational chart depicting the structure of the U.S. company as of January 10, 2009; lists the company's goals for the next three years; lists the beneficiary's major accomplishments during the first year of operation; and provides detailed job descriptions for the beneficiary, current employees and future positions to be filled.

The petitioner asserts that while the beneficiary initially performed some non-qualifying tasks, "the addition of 3 employees to [the company] allowed the staffing levels to reach the adequate levels at which [the beneficiary] no longer had to contribute to non-managerial tasks and was given the opportunity to develop new business ventures and increase the volume of the current business. Further, the petitioner asserts that all current employees of the company have completed at least a bachelor's degree in their specialized fields and do qualify as professionals. The new job description for the beneficiary lists his title as "Marketing Manager and North American Sales Manager," and lists 15 duties. The description will not be repeated here in its entirety; however, the main responsibilities are listed as developing pricing strategies, identifying and developing marketing strategies, formulating, directing and coordinating North American marketing activities, evaluating financial aspects of new product design and development, negotiating exclusivity contracts and sales conditions, and hiring, training and evaluating marketing and sales staff.

The petitioner states that it currently employs an ERP systems analyst, a market research manager, and an advertising and promotions manager/branch manager. The petitioner's revised organizational charts lists position openings for a purchase and warehouse manager, a technical sales representative and a sales representative. As evidence of wages paid to these employees, the petitioner submits copies of company checks dated between December 12, 2008 and December 18, 2008.

Since filing the appeal on January 23, 2009, the petitioner has supplemented the record with three additional statements dated March 30, April 6, and May 3, 2009, and additional evidence relating to the company's ongoing business activities in 2009. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, the AAO will limit its review to evidence that establishes the beneficiary's eligibility as of November 2008.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's business as its president and senior member of its two or three-person staff, the totality of the evidence submitted does not demonstrate that the beneficiary's actual duties will be primarily managerial or executive in nature.

The petitioner's initial description of the beneficiary's duties was vague and failed to provide any insight into what it is the beneficiary does on a day-to-day basis as the petitioner's president. The petitioner stated that the beneficiary will "direct U.S. expansion of sales and consulting operations," manage marketing and sales, "direct procurement," "serve as a direct executive/managerial liaison" between the U.S. company, customers and parent company, "hire and train personnel, and "direct all [of the U.S. company's] activities including the essential functions of budgeting, contract negotiation and human resources." While such responsibilities provide a broad view of the scope of the beneficiary's activities, they fail to illustrate what specific tasks the beneficiary performs to accomplish his objectives. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The detailed business plan submitted with the initial filing shed additional light on the nature of the beneficiary's duties, and suggested that he has been and will be directly providing Six Sigma consulting services to NAPA Auto Parts and other U.S. auto parts and auto manufacturing companies. According to the business plan, the beneficiary would be managing over 75 active projects within NAPA Auto Parts throughout 2009. The record also shows that more than 90% of the revenue generated by the petitioner during its first year of operations was derived directly from the beneficiary's services as a consultant to NAPA Auto Parts. The petitioner submitted three letters from NAPA executives indicating that the beneficiary would continue this relationship throughout 2009, as well as a letter from CPI Consultant Group stating that the beneficiary would have "daily involvement" in ongoing Six Sigma projects throughout 2009. Based on this evidence, it is reasonable to believe that a substantial portion of the beneficiary's time has been and will be devoted to personally providing Six Sigma consulting services. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In response to the director's request for a detailed position description indicating the specific tasks the beneficiary performs and the percentage of time he devotes to each duty, as well as a specific day-to-day description of the duties the beneficiary had performed over the last six months, the petitioner submitted a job description that was even more general than that provided with the initial petition. The petitioner stated that the beneficiary will devote 60% of his time to manage and direct the sale of the foreign entity's gasket products in the United States "through a subordinate team of function managers, degreed professionals and other skilled workers," with the remaining 40% of his time dedicating to "managing the delivery of the company's management consulting services to its largest corporate consulting client." These statements were barely responsive to the director's request for a detailed and specific description of the beneficiary's duties. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO acknowledges that the petitioner has submitted a more detailed description of the beneficiary's duties on appeal; however, the newly-submitted job description will not be considered for two reasons. First, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the detailed description of the beneficiary's duties to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* The petitioner concedes that its previous submissions were "not able to clearly communicate [the beneficiary's duties]." Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Further, whereas the initial evidence suggested that the beneficiary has been and will be devoting a significant portion of his time to providing consulting services, and the petitioner later stated in response to the RFE that the beneficiary devotes 40 percent of his time to "managing the delivery of the company's managing consulting services," the job description submitted on appeal conspicuously and inexplicably omits any job duties relating to this branch of the company's operations. Absent some reasonable explanation from the petitioner, the AAO is not persuaded that the beneficiary's proposed duties changed so significantly between the time the petition was filed in November 2008 and the time the appeal was filed in January 2009. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Overall, the descriptions of the beneficiary's duties submitted prior to the adjudication of the petition included a combination of vaguely described managerial duties and non-qualifying duties suggesting that the beneficiary, as of the end of the first year of operations, was still directly involved in providing the services of the U.S. company. A review of the petitioner's staffing levels at the time of filing, as discussed further below, also suggests that the beneficiary, was actually directly performing the majority of the petitioner's sales and marketing tasks and directly providing the petitioner's Six Sigma Consulting services at the time of filing, as opposed to managing such activities with the support of a subordinate staff, as claimed by the petitioner in response to the request for evidence.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) requires the petitioner to submit a statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees. At the time of filing, the petitioner claimed to employ one employee and one contractor. The petitioner stated in its business plan that the employee, ██████████ would be trained as a Six Sigma Green Belt to assist with consulting activities and that he was providing support with market research and maintaining a project tracking tool development by the beneficiary. The contract he signed with the petitioner indicates that he was hired to develop applications and web applications. In response to the RFE, the petitioner stated that ██████████ provides support for internal ERP software and develops software for Six Sigma Consulting. The petitioner did not indicate that he performed the marketing or consulting duties attributed to him at the time of filing.

As evidence of ██████████ employment, the petitioner submitted a copy of a USCIS Form I-9, Employment Eligibility Verification, completed in September 2008. Any Form I-9 presented by a petitioner must be accompanied by other evidence to show that the employee has commenced work activities. Forms I-9 verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. See *Matter of Ho*, 22 I&N Dec. 206, 212 (Assoc. Comm. 1998). The AAO acknowledges that the petitioner was not required to file its initial state quarterly wage report or IRS Form 941 until January 2009, after the petition was adjudicated. However, the petitioner has not supplemented the record on appeal with these documents. The petitioner has submitted a copy of a single company check in the amount of \$350 issued to ██████████ on December 18, 2008. This is insufficient to establish that he was employed by the petitioner at the time of filing as claimed. Moreover, the check was paid to him for "work order entry – graphical interface" which suggests that he was likely paid on a contract basis and not as a regular salaried employee.

The petitioner indicated that the contractor provides support for web application design projects. The contractor was no longer employed by the petitioner by the time it responded to the request for evidence and the record contains no evidence of payments to this individual. The petitioner indicated that it hired ██████████ as a marketing researcher, but did not provide any evidence of wages paid to him or indicate his hire date, therefore it cannot be determined whether he was hired before the end of the first year of operations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

All other staff claimed by the petitioner were hired in December 2008 or later, and the petitioner indicates that it intends to hire two to three additional employees in 2009. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. At the end of one year, the petitioner employed, at most, one employee and one contractor, but it has not adequately documented the nature of their duties or submitted sufficient corroborating evidence of wages paid to them, as required by 8 C.F.R. § 214.2(l)(14)(ii)(D). Therefore, while the AAO does not doubt that the beneficiary has the authority to hire and fire employees, the evidence of record does not establish that he was supervising and controlling the work of a subordinate staff of managerial, supervisory or professional employees at the time the petition was filed.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed job description clearly stating the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Although the petitioner has indicated that the beneficiary manages and directs the sales and marketing function and manages the delivery of management consultant services, the essential functions of the petitioning company, it is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. Even if the AAO considered the employee and contractor the petitioner claimed to employ at the time of filing, the contracts these employees signed indicate that they were hired to develop applications, not to perform sales, marketing or management consulting duties. Therefore, it is reasonable to conclude that the beneficiary himself was responsible for marketing the foreign entity's products in the United States and providing consulting services to the petitioner's customers at the end of the first year of operations. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; see also *Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008). Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed above, the petitioner has not sustained this burden.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of

managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* Here, the petitioner has not established that the beneficiary is relieved from direct involvement in the day-to-day operations of the enterprise.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

Furthermore, in the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Even though the petitioning enterprise is in a preliminary stage of organizational development and anticipates additional growth, the petitioner is not relieved from meeting the statutory requirements. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant matter, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.